IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 3 OF 2006

Mr. Narendra V. Kanekar,
Major of age, business,
R/0. Alto Duler,
Dangui Colony, Mapusa-Goa. ..... Petitioner

V e r s u s

1. The Bardez-Taluka Co-op.
   Housing Mortgage Society Ltd.,
   Having its office at G1, A-4,
   Communidade Mini Market Complex,
   Housing Board, Mapusa, Goa,
   Represented by its Secretary
   Mr. Vithal A. Sawant,
   Major, service,
   R/o. Ekta Nagar,
   Housing Board Mapusa, Goa.

2. State of Goa,
   through the Public Prosecutor
   (The above are registered addresses
   of the parties). ..... Respondents

Mr. S. D. Padiyar, Advocate for the Petitioner.

Mr. S. A. Samant, Advocate for Respondent no.1.

CORAM: N. A. BRITTO, J.

DATE: 20th April, 2006.

JUDGMENT

The petitioner herein, is an accused who has been convicted and sentenced under Section 138 of the Negotiable Instruments Act, 1881, ('*Act*', for short), by the learned J.M.F.C., Mapusa, by Order dated 29.07.2005 and which Order in appeal has been confirmed by the learned Assistant Sessions Judge, Mapusa. The controversy in this revision is in relation to the explanation below Section 138 of the Act, which reads as follows:-

> *Explanation:-* For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

2. Some facts are required to be stated to dispose of this revision.

3. The Complainant (respondent herein), is a Society having its business of advancing loans for the purpose of construction to its members, and, the accused is a member of the said Society. The accused and his wife had availed a loan of Rs.3,55,000/- on 05.11.1996 with a condition to repay

the same with interest at the rate of 18% or higher rate of interest plus 0.6% along with charges which might have been incurred by the said Complainant. The Complainant had called upon the wife of the accused for repayment of overdue installments and on or about 30.09.2003, the accused and his wife executed an affidavit/undertaking admitting the said loan amount and confirming the outstanding balance of Rs.12,95,565/- including interest as on 30.12.2003 and along with the said affidavit/undertaking, the accused issued three cheques dated 30.10.2003 for Rs.5,00,000/-, 30.11.2003 for Rs.4,00,000/- and 30.12.2003, for Rs.3,95,565/-, drawn on Syndicate Bank, Mapusa, which the Complainant stated were drawn in his favour in discharge of legally recoverable debt towards the repayment of the said loan including interest and, as per the letters of the accused dated 29.11.2003 and 27.12.2003, the cheques were deposited on 31.01.2004 only to be returned dishonoured on 16.02.2004 with endorsement that the funds were insufficient, whereupon the Complainant through his Advocate by notice dated 03.03.2004, demanded payment of the said sum of Rs.12,95,565/-, but the accused failed to comply with the same within a period of 15 days as stipulated therein, and hence the complaint.

4. Admittedly, the loan was taken on 05.11.1996, payable with interest, as aforesaid and the cheques came to be issued on 30.09.2003, 30.10.2003, 30.11.2003 and 30.12.2003, which were issued much beyond a period of three years. There appears to be preponderance of judicial opinion in support of the view that only if the cheque is issued in discharge of a legally enforceable debt or other liability that Section 138 of the Act is attracted but if a cheque is issued for the discharge of a time barred debt and it is dishonoured, the accused cannot be convicted under Section 138 of the Act. This view was first taken in ***Girdhari Lal Rathi v. P.T.V. Ramanujachari (1997 (2) Crimes 658)***, then by this Court in the case of ***Smt. Ashwini Satish Bhat v. Shrijeevan Divakar Lolienkar (1999 (1) G.L.T. 408)*** and ***Joseph v. Devassia (2003 K.L.T. (3) 533)*** and it appears that the last Judgment also has the imprimatur of the Apex Court in Special Leave to Appeal (Cri) No.1785/2001, which was dismissed by Order dated 10.09.2001 and, therefore, needs to be followed by this Court. However, the question is as to what is the legal effect of the said declaration/affidavit given by the accused prior to giving of the said three cheques ?

5. That takes us to Section 25 of the Indian Contract Act, 1872, which provides that an agreement without consideration is void, unless it is

in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation of law. It further provides that an agreement made without consideration is void, unless -

> (1) ...
>
> (2) ...
>
> (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
>
> In any of these cases, such an agreement is a contract.
>
> *Explanation 1*: Nothing in this Section shall affect the validity, as between the donor and donee, of any gift actually made.
>
> *Explanation 2*: An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be

> taken into account by the Court in determining the question whether the consent to the promisor was freely given.

6. Reference to illustrations (e) would not be out of context. It reads as follows:-

> (e) *A* owes *B* Rs.1000/-, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs.500/- on account of the debt. This is a contract.

7. Shri Padiyar, the learned Counsel on behalf of the petitioner/accused has submitted that the cheques in question were issued beyond the period of limitation and there was otherwise no acknowledgment of debt in writing given prior to the expiry of the period of limitation. Shri Padiyar has submitted that the said undertaking at the most may give a right to file a suit and recover the payment due on the said cheques but not for the purposes of prosecution under Section 138 of the Act. On the other hand, Shri Samant, the learned Counsel on behalf of the respondent/Complainant has submitted that the undertaking or promise

given by the accused is legally enforceable under Section 25(3) of the Indian Contract Act and, therefore, the debt is still enforceable by the Complainant. In support of his submission, Shri Samant has placed reliance on the Division Bench Judgment of Kerala High Court in the case of ***Dr. K. K. Ramakrishnan v. Dr. K. K. Parthasaradhy & Anr. (2005 (1) DCR 165)***, and has submitted that even a case where a claim for recovery in Civil Suit has become barred by limitation, a promise made in writing and signed by the executant to pay, becomes an agreement supported by consideration and such an agreement is enforceable under law. Shri Padiyar, the learned Counsel on behalf of the petitioner, on the other hand, has submitted that the said Judgment of the Division Bench in fact did not consider any case of any agreement or undertaking given under Section 25(3) of the Indian Contract Act, 1872, and therefore, would be inapplicable to the facts of the present case in the light of the Judgment of this Court in the case of ***Ashwini Satish Bhat v. Shrijeevan Divakar Lolienkar*** (supra), which this Court is required to follow.

8. The learned Division Bench of Kerala High Court has in terms not followed the said three decisions noted hereinabove, including the Judgment of this Court in the case of ***Ashwini Satish Bhat v. Shrijeevan***

Divakar Lolienkar (supra). As far as mere issue of cheque is concerned, issued after the expiry of period of limitation, then there is no dispute that this Court would be bound to follow the Judgment in the case of ***Ashwini Satish Bhat v. Shrijeevan Divakar Lolienkar*** (supra), being a Judgment of a co-ordinate bench and, to that extent, the ultimate finding in the case of ***Dr. K. K. Ramakrishnan v. Dr. K. K. Parthasaradhy*** (supra), with respect, does not appear to be correct and therefore need not be followed.

9. Mere giving a cheque, without anything more, will not revive a barred debt, because cheque has to be given, as contemplated by the explanatory in discharge of a legally enforceable debt. There is no doubt that in terms of the Indian Limitation Act, 1963, a signed acknowledgment of liability made in writing before the expiration of the period of limitation, is enough to start a fresh period of limitation. Likewise, when a debt has become barred by limitation, there is also Section 25(3) of the Contract Act, by which, a written promise to pay, furnishes a fresh cause of action. In other words, what clause (3) of Section 25 of the Indian Contract Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce payment by suit, and if the payment could be enforced by a suit, it means that it still has the

character of legally enforceable debt as contemplated by the explanation below Section 138 of the Act. As far as this aspect of the case is concerned, the learned Division Bench observed that to determine as to whether or not a liability is legally enforceable, the provisions of the Contract Act cannot be said to be irrelevant. This can provide a cause for a legal liability. Although the primary question answered by the Division Bench was that a cheque becomes a promise to pay under Section 25(3) of the Contract Act, this view need not be followed by this Court in the light of the Judgment of this Court in the case of ***Ashwini Satish Bhat v. Shrijeevan Divakar Lolienkar*** (supra) and the other two Judgments referred to hereinabove. Nevertheless, the Division Bench Judgment is relevant to the extent that it holds that a promise to pay in writing as per Section 25(3) of the Indian Contract Act, 1872, matures into an enforceable contract, which can be enforced by filing a Civil Suit. If a suit could be filed pursuant to a promise made in writing and signed by the person to be charged therewith, as contemplated by clause (3) of Section 25 of the law of Contract, then, in my view, the debt becomes legally enforceable and if a cheque is given in payment of such debt is dishonoured and subsequently, the statutory notice is not complied with, then the person making the promise in writing and issuing the cheque, would still be liable to be punished under Section 138 of

the Act.

10. In view of the above, I find there is no merit in this revision and, consequently the same is hereby dismissed.

N. A. BRITTO, J.

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